Civil Procedure Rules Revision Project

Report of the
Determinations Without Trial Working Group

This group is chaired by the undersigned. The other members are:

The Honourable Justice Joel E. Fichaud
The Honourable Justice Suzanne M. Hood
Mr. John E. S. Briggs
Mr. Robert G. Grant, QC
Ms. Darlene A. Jamieson
Mr. William F. Laurence
Ms. Agnes MacNeil
Mr. John T. Rafferty, QC
Mr. W. Augustus Richardson.

This working group was one of eight formed by the Steering Committee of the Civil Procedure Rules Revision Project of Nova Scotia in the course of meetings held in May and June 2004. Each working group was given latitude to develop issues in reference to the group's topic. "It was agreed that the Chair of each working group should work out the issues to be examined by their particular group.", Steering Committee Minutes 14 June 2004 point 9. We took guidance from the Consultation Paper circulated by the Nova Scotia Law Reform Commission and examined issues on our topic as reported upon under the headings that follow. Throughout, the Working Group was assisted by the Law Reform Commission with minutes, comparative analysis of civil procedure rules and numerous research papers.

Hearing Instead of Trial. Presently, disputes may be resolved finally upon hearing without trial under rule 9.03 concerning proceedings commenced by originating notice (application), rule 25 concerning questions of law, rule 27 concerning special cases, rule 28.04 concerning setting down and rule 37 concerning applications. As interpreted by the courts, these rules have a narrow focus. For the most part, they are restricted to cases where there is no dispute as to any material fact. We are unanimously of the view that determinations by hearing without trial should be more easily available. There are many kinds of cases where justice is better served by quick and easy access to determination than by the full array of pre-trial procedures followed by trial.

We are not here concerned with inter partes applications, appeals to the Supreme Court or judicial review. We recommend that all originative, first instance applications come under a single rule. A document entitled "Application" would lead to a hearing rather than a trial. In addition to a return date and a statement of relief sought, the "Application" would contain a brief statement of grounds, that is, a point form summary of material facts the applicant seeks to have the court find and brief references to statutes and rules of law relied upon. It would be accompanied by an affidavit or affidavits providing all direct evidence of the applicant in the case-in-chief unless the court permitted a supplemental affidavit and set a deadline for filing and service. Within a period specified in the rules, a respondent would file and serve a statement indicating which of the applicant's material facts are disputed, material facts sought to be established additionally by the respondent and the respondent's statutes or rules of law. This too would be accompanied by an affidavit or affidavits providing all direct evidence the respondent intends to produce unless the respondent first got permission from the court to file a supplemental affidavit within a specified time. There would be an opportunity for the applicant to file affidavits in rebuttal. An applicant could have default judgment where a respondent fails to file and serve a statement of its position and an affidavit.

We recommend that the rules of evidence, including hearsay, apply on applications. The judge would have to rule on objections to evidence in affidavits during the hearing. The rules should expressly recognize the judge's discretion to order a substantial indemnity where inadmissible information in an affidavit caused unnecessary expense to another party.

All applications would not lead to the same procedures or the same kind of hearing. We recommend the following for all originative, first instance applications where there is not to be a consent order:

1. **Ordinary Chambers**

   A hearing in ordinary chambers without cross-examination and where submissions will take less than one hour. The date of hearing stated in the "Application" would be no less than two weeks after filing and service. The respondent would have one week to file its affidavits. Responding affidavits would be limited to new points, with cost consequences for violation. They would be filed and served three days before hearings. Briefs would be delivered and exchanged at least three days before the hearing.

2. **Special Chambers**

   A half day or full day hearing in special chambers. The date of hearing stated in the "Application" would be no less than two months after filing and service. The respondent would have one month to file and serve its documents. Provision would be made for responding affidavits. If the parties agreed or if the Court ordered, cross-examination would take place out of Court and a transcript would be filed. Otherwise, the hearing would be devoted to both cross-examination and submissions. Briefs would be delivered to the judge and exchanged between the parties at least one week before the hearing.

3. **Weekly List**

The hearing date or dates would be set by a judge. The "Application" would be filed along with the affidavits but the application would refer to a hearing "on a date to be set by a judge". An interlocutory notice supported by an affidavit dealing with procedural issues would be returnable within two weeks of service in chambers or by telephone conference. Respondents would have a week to file affidavits dealing with procedural issues. The judge would set hearing dates and give directions as to:

a. when the respondent's affidavits must be filed,
b. any rebuttal affidavits,
c. cross-examination in Court or otherwise,
d. deadlines for expert's reports if permitted by the judge,
e. any discovery,
f. limits on any discovery,
g. any production of documents,
h. any reference of issues to an expert or other referee,
i. documents to be introduced through cross-examination,
j. agreed statements of fact, notices to admit and admissions,
k. evidentiary objections,
l. delivery and exchange of briefs,
m. any other directions for a just, speedy and inexpensive determination.

Who would decide to have an application and a hearing rather than an action and a trial? The initial decision to pursue the application or an action would be made by the initiating party. However, an opposite party could apply to a judge to convert an application or an action. Present attitudes tend to favor action and trial. We think counsel and the Court should be encouraged to make greater use of applications. Therefore, we recommend that on a motion for conversion the

onus should be upon the party proposing trial. Also, on motions to convert an application to an action, the proponent should be required to fully disclose its evidence and positions on all issues raised by the application and all issues the party foresees raising by way of response affidavits or defence. Similarly, the initial decision to have a chambers, special chambers or weekly list hearing would be made by the initiating party but a judge could order a different procedure. We expect that in most cases the selection of a hearing or a trial and, if it is to be a hearing, the selection of a procedure, would be discussed and agreed by counsel. We expect that the level of agreement would increase with experience under the new system.

We recommend the rules state principles by which the judge's discretion to convert an application or an action must be guided. These should include: (1) Issues of credibility going to material facts indicate action and trial, but such do not necessarily preclude application and hearing. (2) A hearing is indicated where the issues in dispute are substantially questions of law, with fact-finding required only to place the legal questions on context. (3) A hearing is indicated where the factual issues are to be determined substantially through a reference. (4) The value of the claim, the cost of trial and the cost of hearing are relevant to the issue. (5) Time is relevant to the issue. (6) Where substantial rights could be diminished or extinguished by passage of time expedited hearing dates and abbreviated pre-hearing procedures are indicated. (7) A statutory requirement for an application or equivalents would have to be initiated by application. (8) There is no requirement that the parties agree on any facts in order for the Court to make any determination by hearing rather than trial. (9) Applications would be the norm and actions the exception where the case turns on the interpretation of an enactment, a municipal by-law, a corporate by-law or a private instrument such as a contract, deed or will; where a party seeks the opinion or direction of the Court in connection with the estate of a deceased person, a guardianship, a receivership, a trust, or; where a party seeks to remove or replace a representative, receiver, executor, administrator, trustee or guardian.

Questions of Law Before Trial. As regards the other route, action and trial, we recommend that the new rules continue the provisions for determination of questions of law in advance of trial but we also favor a more liberal use of this power. We suggest that the new rules abolish any requirement for an agreed statement of facts and provide for a separate determination of the question of law if it is shown (1) that determination would dispose of the proceeding or shorten the hearing or trial, (2) that severance of the issue would not likely lead to contradictory findings, and (3) the question fits within the principles for a hearing instead of a trial. The Court should have the power to select any of the three levels of hearing if it decides to sever a question of law. We suggest that the rule for severing questions of law and the rule for summary judgment should be written as part of or near to the rule for applications and hearings.

Summary Judgment. We recommend the American "genuine issue" formulation of the principle for summary judgment over our "arguable issue", although they mean the same thing. The American formulation is followed almost everywhere else in Canada. Also, we recommend following Ontario where it expressly grants the summary judgment motion judge a discretion to determine a question of law where the answer is all that stands in the way of judgment.

It should be possible to combine a motion for summary judgment with an application and hearing as discussed under the first heading.

We are of the view that summary judgment applications should be heard in the county of the respondent's solicitor's residence or the respondent's residence if they are without counsel. It could be heard elsewhere on consent or order.

Taking our cue from those authorities which say that summary judgment applications involve an assessment of the respondent's proposed evidence to determine whether the respondent's position deserves a trial, we are of the view that the respondent ought to be required to produce responding evidence or face default judgment. In Ontario, the rules provide that the responding party cannot

"rest on the mere allegations or denials of the party's pleadings" but must produce evidence of "specific facts showing that there is a genuine issue for trial". We recommend that our rules provide for "default" judgment if the respondent does not produce an affidavit disclosing the evidence in favor of the respondent's claim or defence. However, the rule should provide that a judge may order the applicant to make disclosure of any document or to provide witnesses for discovery where the respondent's claim or defence depends on evidence in the control of the applicant.

Where a summary judgment application has been heard and dismissed, an opportunity presents itself. There is a judge who is well aware of the case and there are counsel who are refreshed in their knowledge of the case and their client's requirements. We miss an opportunity and cause waste where, as usual, no one follows through with rule 13.02(1). That rule gives the judge a discretion to provide directions for the trial or hearing of the claim. We recommend the new rules give greater prominence to this provision and to the possibilities for savings through directions that may cut down on pre-trial or pre-hearing production or discovery. In Ontario, when a motion for summary judgment fails, the court may make an order specifying facts not in dispute or defining the issues. It may order a speedy trial, limit discoveries to subjects outside the affidavits and cross-examination or provide for the affidavits and cross to stand in place of such at trial. We understand that, except for the limitation on discovery, these provisions are not vigorously used in Ontario. We think opportunities are being missed. We recommend that the rules provide for directions to be given by the chambers judge upon dismissing a summary judgment application, or by conference soon afterwards, concerning specifying facts not in dispute, specifying the issues, limiting discoveries to matters outside the affidavits and cross-examination, allowing the affidavits and cross-examination to stand in place of direct and cross on the issues they deal with, setting down trial, or ordering a hearing instead of a trial.

Before our rules permitted summary judgment applications by defendants, a defendant's similar recourse was to move to strike pleadings under rule 14.25, which concerns abuse of process. We recommend that failure to disclose a cause of action, failure to disclose a defence, hopeless causes and hopeless defences should be dealt with under summary judgment. The Alberta Project decided to retain the equivalent of rule 14.25. Largely for the reasons expressed in the next section, we think it should be replaced by a general Abuse of Process rule and by the summary judgment rule, including a feature where summary judgment could be sought just on the face of the pleadings.

Abuse of Process. We think that, through its focus upon pleadings and its Victorian prose, rule 14.25 obsures the broad and serious powers upon which it rests: the power of the Court to control its own processes generally and the power of the Court to prevent abuse particularly. We recommend that the new rules include a stand-alone chapter on inherent jurisdiction and abuse of process. It would simply recognize the inherent jurisdiction and particularly the power to control abuse by any just means. It would not attempt the categorization now in 14.25 or any categorization.

Default Judgment. We think the rules for default judgment require no substantial changes. They should be placed near questions of law, summary judgment and applications.

Special Cases and Stated Cases. These are never used. To the extent that rule 27 concerns a special case stated to the trial court, our proposals for an application provide all that is required. To the extent that rule 27 provides for a reference to the Court of Appeal, we believe that appeals are better served by a trial level determination in the first instance. Even in cases of a highly legal nature the issues become more rarified through a trial level, first instance determination.

Interpleader. The present rules provide for the sheriff to interplead in the course of an action. We agree with the suggestion made to the Steering Committee by Mr. Ronald Richter that application and hearing should be the presumptive way of dealing with interpleader and that the interpleader rule should extend to any person holding a stake.

For the Group,

Gerald R. P. Moir
Chairperson

Halifax, Nova Scotia
20 May 2005